Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-229

In The

Supreme Court of the United States

October Term, 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Petitioner,

v.

APEX CONSTRUCTION COMPANY, INC., a corporation; BREISCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, BREISCH ENGINEERING COMPANY, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioners' presentation of the questions for review are satisfactory to this Respondent.

PARTIES TO THE ACTION

The names of all parties and their designations are properly referred to in the caption of the case in the Court, with the exception that Respondent BREISCH ENGINEERING COMPANY, INC. is incorrectly referred to as BRIESCH ENGINEERING COMPANY, INC.

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BRIEF IN OPPOSITION OF RESPONDENT, BREISCH ENGINEERING COMPANY, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent BREISCH ENGINEERING COMPANY, INC. ("BREISCH") hereby submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by

Petitioners THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma (collectively "the TRIBE").

STATEMENT OF THE CASE

BREISCH hereby adopts the Statement of the Case contained in the Opposing Brief of Respondents APEX CONSTRUCTION COMPANY, INC. and OKLAHOMA SURETY COMPANY ("APEX" and "OKLAHOMA SURETY", respectively) to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR NOT GRANTING THE WRIT

BREISCH hereby adopts APEX's and OKLAHOMA SURETY's preliminary discussion of 25 U.S.C. §81 and its history and in further support of the inescapable conclusion that §81 was enacted to regulate only those contracts between a tribe or individual Indians and attorneys or claim agents for services in establishing claims on behalf of the tribe or individual Indians against the United States under

federal laws or treaties, BREISCH would direct the Court's attention to 25 U.S.C. §81a adopted June 26, 1936, which specifically refers to "contracts. . . between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States. . . " and §81b referring to "any. . . contract. . . by any tribe, band, or group of Indians with an attorney or attorneys for the rendition of services in the prosecution of claims against the United States. . . ". Clearly it was the intent of Congress in enacting §§81A and 81b to limit the scope of §81 to those contracts between tribes and their attorneys for prosecution of claims against the United States and not to have §81 apply to any and all contracts with an Indian tribe no matter how nebulously "related" to Indian lands.

A. THE CIRCUIT COURTS ARE NOT IN CONFLICT.

The TRIBE asserts that their Petition for a Writ of Certiorari should be granted because of an apparent conflict between the decision of the Tenth Circuit herein, The Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction

Company, Inc., 757 F.2d 1221 (10th Cir., 1985) and decisions of the Seventh, Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir., 1985) and Ninth Circuits, United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir., 1976). However, a review of the facts and holdings in the latter two cases reveals no conflict among the circuit courts on the applicability of §81 to construction contracts.

The TRIBE paints the holdings of the Seventh and Ninth Circuit Courts with the same broad brush in concluding that the Wisconsin Winnebago Business Committee v. Koberstein, supra., and the United States v. Southern Pacific Transportation Company, supra. cases dealt with the application of 25 U.S.C. §81 "to contracts for the construction of improvements upon Indian Tribal lands." Even the most cursory review of those decisions unequivocally reveals that neither case dealt with nor turned upon contracts for construction of improvements on tribal lands.

The Seventh Circuit in the Wisconsin Winnebago case found that:

> "Because the Agreement gives Ho-Chunk the absolute right to control the operation of the bingo facility located on tribal trust lands and prohibits the exercise of the Business Committee's right to encumber tribal trust property, we hold that the Bingo Management Agreement is an 'agreement. . . relative to [Indian] land,' as that term is used in 25 U.S.C. §81. Cf. Contracts for the Employment of Managers of Indian Tribal Enterprises, 61 Op. Solicitor, Dept. of Interior, No. M-36119 (Feb. 14, 1952) (contract to operate a tribal farming enterprise, including the cultivation of tribal lands, the development of livestock industries to utilize the crops raised by the enterprise, and the marketing of surplus crops is relative to Indian lands as that term is used in §81)." Wisconsin Winnebago Business Committee v. Koberstein, supra. at 619.

Obviously, the decision in Wisconsin Winnebago turned not upon the construction contract, but rather upon the agreement granting to a third party absolute control over the operation of tribal trust property and prohibiting the tribe's right to encumber same; a totally different situation from the construction and engineering contract upon which the TRIBE sued herein.

Nor does the decision of the Ninth Circuit in United States v. Southern Pacific Transportation Company, supra., involve a contract for the construction of improvements upon tribal lands. Rather Southern Pacific was a trespass

suit against the railroad for operating its railway across the reservation of the Walker River Paiute Tribe of Nevada without having first obtained a valid right-of-way from the tribe under the terms of 25 U.S.C. §177 which provides in pertinent part:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Ninth Circuit Court only mentioned 25 U.S.C. §81 in passing, holding that "(a) license may not be inferred as an implied-in-fact contract because of the failure of Southern Pacific to comply with 25 U.S.C. §§81 and 84, which govern contracts with Indian tribes." An implied-in-fact license to operate a railway across tribal lands is quite similar to the management agreement in Wisconsin Winnebago; both agreements would prevent the tribe from exercising its own control and discretion over tribal property, which situation does not exist under the engineering and construction contracts sued upon herein.

Further, the TRIBE has wholly neglected to apprise this Court of the Ninth Circuit's decision in Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir., 1980) which is factually the most analogous case to the instant cause.

In Gila River, an action was brought by an Indian tribe against an architectural firm and a building contractor for damages for negligent design and construction of a youth center on reservation lands. The district court dismissed for lack of jurisdiction and the Ninth Circuit affirmed, holding that 28 U.S.C. §1362, which provides for district court jurisdiction over suits brought by Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States, only extends to actions involving the possessory rights of tribes to tribal lands. Id. at 714. With regard to jurisdiction under 28 U.S.C. §1331, the Ninth Circuit stated:

> "We can discern no reason in the present case to extend the reach of the federal common law to cover all contracts entered into by Indian tribes. Otherwise the federal courts might become a small claims court for all such disputes.
>
> . . .

> We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws. Nor has the tribe pointed out why national uniformity of rules governing these transactions would be desirable. . (Citations omitted). Adoption of state law in such cases does not present a conflict with the federal policy or interest in protection of Indian tribes. Nor has any other court perceived the need for federal common law rules governing contract disputes between Indian tribes and non-Indians." Id. at 714-715.

Rather than being in conflict with the decision of the Tenth Circuit herein, the Ninth Circuit's decision in Gila River is on all fours with the appellate court's decision in this matter. Further, the decision herein is on all fours with the case of Brown v. United States, 486 F.2d 658 (8th Cir., 1973) which held that §81 governs only "the right to be compensated with tribal funds." Id. at 661.

In summary, there is absolutely no conflict among the circuit courts regarding the applicability of §81 to engineering and construction contracts. The Wisconsin Winnebago and Southern Pacific courts found that §81 applied in those particular cases because the contracts litigated therein affected the absolute right of the tribe to control and manage its tribal property. Gila River, which is

factually analogous to the instant situation, did not apply §81, and Brown is on point with the Tenth Circuit herein in limiting §81 applicability to those contracts involving compensation from tribal funds. The decision of the Tenth Circuit herein is unequivocally just and follows, rather than conflicts, with the rationales of the other circuit courts.

B. THE DECISION OF THE TENTH CIRCUIT DOES NOT DEPART FROM ESTABLISHED STATUTORY CONSTRUCTION.

Like APEX and OKLAHOMA SURETY, BREISCH does not disagree with the TRIBE's general statement of the rules of construction of Indian statutes. However, BREISCH strongly disagrees with the TRIBE's contention that the district court and the Tenth Circuit "eviscerated" the plain language of the statute and resolved all possible ambiguities against the TRIBE in contravention of established canons of Indian law construction.

As clearly pointed out by the trial court below, the legislative history behind 25 U.S.C. §81 reveals that it was intended to prevent the "godless robbery of those defenseless people" by attorneys and claim-agents. The

statute was clearly not intended to allow a tribe to enter into commercial construction contracts utilizing federal grant funds and then declare the contract invalid and retain both the grant funds and the improvements made therewith. To apply the Tribe's construction of §81 to the instant case would simply and undeniably allow the TRIBE to commit a "godless robbery" of the Respondents herein. Even the most liberal construction of Indian laws in favor of the Indians cannot extend to such obvious unjust enrichment of the TRIBE to the detriment of third parties who have contracted with the TRIBE in good faith.

The TRIBE's construction of 25 U.S.C. §81 goes far beyond the bounds of liberal construction in favor of the Indians and would result in the unjust enrichment of the TRIBE to the detriment of both the United States which made the grant and of the Respondents who performed the contract.

C. **THE TENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

Lastly, in petitioning this honorable Court for a writ of certiorari, the TRIBE contends that the Tenth Circuit's decision is in direct conflict with this Court's decisions in Green v. Menominee Tribe of Indians in Wisconsin, 233 U.S. 558, 34 S.Ct. 706, 58 L.Ed. 1093 (1914) and Pueblo of Santa Rosa v. Fall, 273 U.S. 316, 47 S.Ct. 361, 71 L.Ed. 658 (1927).

APEX and OKLAHOMA SURETY have adequately addressed the factual content of Green and BREISCH will not burden the Court with a repetition thereof. However, BREISCH would call the Court's attention to two facets of the opinion in Green which clearly show why §81 was found to be applicable.

The Court therein stated:

> "But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is inapplicable, we are of the opinion that the case as made is so within the spirit of the statute, and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more

> cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor, manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting, as the exigencies of the case required, to a claim against the tribe as principal, and secondarily against the members are mere accessories, culminating in a prayer for relief which, in and of itself, points to the uncertainty with which the transactions referred to were environed." Id. at 569-570.

Thus, the Court in Green found that §81 should act as a shield for the tribe and its individual members because of the uncertainties in the transaction.

Secondly, the Court found that the case "as made involves deciding whether the petitioner (Indian trader) should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advance of supplies; that is to say, whether the Indians, after having placed in the hands of the designated person the sum of the supplies, are under the obligation to pay again, - that is, to pay twice." Id. at 571.

It is patently clear that the Court in Green found §81 to be applicable in order to protect the Indians from paying twice for the supplies. The Indians were not unjustly

enriched because they had already tendered payment to the designated party. Therefore, the issue was whether the risk of loss should fall upon the Indians or the supplier.

This risk-balancing situation simply does not exist in the instant case, nor does the evil of uncertainty as to the alleged debtor, and other terms of the agreement, and Green is simply inapplicable.

The decision in Pueblo of Santa Rosa, supra., is also wholly inapplicable to the present case as it dealt with precisely the type of contract sought to be prevented by §81; i.e. a conveyance of property to a party in consideration of establishing the Indian's claim thereto with the government. The Court therein simply held that the attorney who brought the action seeking to enjoin the Secretary of the Interior from offering, listing or disposing of certain lands in Arizona as federal public land was not authorized to bring the suit on behalf of the pueblo because the attorney's contract violated §81.

The Court held:

> "The rights of Indians, unlettered and under national wardship, are here involved, and a deed purporting to convey their half interest in an

> enormous tract of country, without consideration aside from some indefinite and doubtful promise to establish their claim against the government, is upon its face so improvident as to call for affirmative proof of authority of the clearest kind." Id. at 320.

The contracts in Green and Pueblo of Santa Rosa involved the precise evils which §81 was designed to prevent. Their facts are totally inapplicable to the instant case and thus, the decision of the Tenth Circuit is not in conflict therewith.

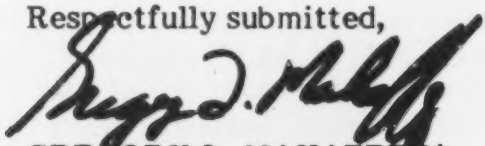
CONCLUSION

The TRIBE has presented no compelling reason why certiorari should be granted. 25 U.S.C. §81 was not enacted to allow Indian tribes to be unjustly enriched at great cost to the United States and to third parties. There is no conflict among the circuit courts in construing §81, the Tenth Circuit followed established rules of construction in determining this case, and the Tenth Circuit followed the rationale of Green and Pueblo of Santa Rosa in finding §81 inapplicable herein.

The Tenth Circuit's decision herein is just and well-considered and, contrary to the TRIBE's contention, will foster rather than negatively effect the ability of Indian tribes to increase their self-sufficiency and economic development by entering into valid engineering and construction contracts with third parties when such do not involve tribal funds.

The petition for writ of certiorari should be denied.

Respectfully submitted,



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September, 1985

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AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Gregory L. Mahaffey, being first duly sworn deposes and says:

1. That he has applied for admission to the Bar of this Court, and that he is an attorney for one Respondent, Breisch Engineering Company, Inc.

2. That the Brief in Opposition of Respondent Breisch Engineering Company, Inc. to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to which this certificate is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 28 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States Mail, first class postage prepaid, properly addressed to:

Messrs. G. William Rice
and F. Browning Pipestem
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Mr. John B. Hayes
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Oklahoma City, OK 73101
Attorney for Respondents,
Apex Construction Company, Inc. and
Oklahoma Surety Company

3. That the foregoing represents service on parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, 40 copies of this Brief in Opposition of Respondent Breisch Engineering Company, Inc. to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 6th day of September, 1985, which is within the time allowed for filing under the Rules of this Court.

GREGORY L. MAHAFFEY

Subscribed and sworn to before me on the 6th day of September, 1985.

NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC IN AND FOR STATE OF OKLAHOMA (SEAL)

GERRY L. HALL
NOTARY PUBLIC, OKLAHOMA COUNTY
My Commission Expires March 28, 19